

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

VAN SPEARS,)	
)	
Petitioner,)	
)	CIVIL ACTION
v.)	
)	No. 04-3447-CM
)	No. 03-20014-01-CM
UNITED STATES OF AMERICA,)	
)	
Respondent.)	
)	

MEMORANDUM AND ORDER

On January 9, 2003, petitioner Van Spears was indicted in the United States District Court for the District of Kansas on three Counts – Count 1 - conspiracy to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. § 846; Count 2 - distribution of 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(iii), and 18 U.S.C. § 2; and Count 3 - possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). On June 4, 2003, petitioner entered into a plea agreement with the United States and pled guilty to Counts One and Three of the indictment, although with respect to Count Three, he actually agreed to plead guilty to “use of a firearm during or in relation to a drug trafficking crime” (as opposed to possession of a firearm). The plea agreement included a statement that petitioner “knowingly and voluntarily waived any right to appeal or collaterally attack any matter in connection with this prosecution and sentence,” including his right to file a motion under 28 U.S.C. § 2255.

Petitioner was sentenced to 97 months imprisonment on Count One and 60 months on Count Three, to run consecutively, on October 15, 2003. On December 6, 2004, petitioner filed a *pro se* petition under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence (Doc. 44). Petitioner

claims that his counsel was ineffective in negotiating his plea agreement, in representing him at sentencing, and by failing to file an appeal on Count Three. He also claims that his sentence violates the Sixth Amendment.

I. Plea Agreement

The government asks the court to enforce the plea agreement based on petitioner's waiver of his right to collaterally attack any matter in connection with his prosecution and sentence. The court will hold a defendant and the government to the terms of a lawful plea agreement. *United States v. Arevalo-Jimenez*, 372 F.3d 1204, 1207 (10th Cir. 2004); *United States v. Atterberry*, 144 F.3d 1299, 1300 (10th Cir. 1998). Generally, a knowing and voluntary waiver of § 2255 rights is enforceable. *United States v. Cockerham*, 237 F.3d 1179, 1181 (10th Cir. 2001). The court applies a three-pronged analysis to evaluate the enforceability of such a waiver, in which the court must determine: (1) whether the scope of the waiver covers the disputed issue; (2) whether the defendant knowingly and voluntarily waived his rights; and (3) whether enforcement of the waiver would result in a miscarriage of justice. *See United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004).

A. Scope of the Waiver

In determining whether the disputed issue falls within the scope of the waiver, the court begins with the plain language of the plea agreement. *United States v. Anderson*, 374 F.3d 955, 957 (10th Cir. 2004); *Hahn*, 359 F.3d at 1328. The pertinent provision in petitioner's plea agreement provides:

Defendant knowingly and voluntarily waives any right to appeal or collaterally attack any matter in connection with this prosecution and sentence. The defendant is aware that Title 18, U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. By entering into this agreement, the defendant knowingly waives any right to appeal a sentence imposed which is within the guideline range determined appropriate

by the court. The defendant also waives any right to challenge a sentence or manner in which it was determined in any collateral attack, including, but not limited to, a motion brought under Title 28, U.S.C. § 2255 [except as limited by *United States v. Cockerham*, 237 F.3d 1179, 1187 (10th Cir. 2001)]. In other words, the defendant waives the right to appeal the sentence imposed in this case except to the extent, if any, the court departs upwards from the applicable sentencing guideline range determined by the court.

The court construes the plea agreement “according to contract principles and what the defendant reasonably understood when he entered his plea.” *Arevalo-Jimenez*, 372 F.3d at 1206 (internal quotation and citations omitted). The court strictly construes the waiver and resolves any ambiguities against the government. *Hahn*, 359 F.3d at 1343.

In the case at hand, arguably, one of the issues that petitioner raises in his § 2255 petition – whether his counsel was ineffective during the plea stage for failing to explain what constituted “use” of the firearm with respect to the § 924(c) charge – does not fall within the scope of the waiver.¹ Even if it does, however, the court finds that petitioner is entitled to some relief for the reasons that follow.²

B. *Knowing and Voluntary*

Petitioner claims that his plea was not knowing and voluntary because his attorney did not inform him of the impact of *Bailey v. United States*, 516 U.S. 137, 150 (1995), on his § 924(c) charge. Petitioner argues that under *Bailey*, he would have objected to the government’s assertion that the gun, which was inoperable, was “utilized for protection,” because *Bailey* provides that “use”

¹ At this time, the court makes no finding as to whether petitioner’s other arguments fall within the scope of the waiver.

² To the extent that this claim falls outside of the waiver, the court would reach the same result under *Strickland v. Washington*, 466 U.S. 668 (1984).

of a firearm must entail “active employment” of the firearm.

The government responds that petitioner was not charged with “**use**” of a firearm. He was charged with **possession** of a firearm in furtherance of a drug trafficking offense. On this point, the government is correct. But petitioner entered a plea of guilty to “**use** of a firearm during or in relation to a drug trafficking crime.” Complicating the matter even more is the fact that petitioner’s petition to enter a plea includes a statement that petitioner, “during and in relation to and in furtherance of the conspiracy to distribute cocaine . . . did unlawfully **possess** in furtherance of such crime, a firearm. . . .” Moreover, while the factual basis for the guilty plea supports a “possession” conviction, it does not support a “use” conviction; defendant acknowledged that the gun was within feet of drug proceeds and was “utilized for protection during and in relation to the trafficking of drugs and proceeds therefrom.” *See United States v. Jenkins*, 313 F.3d 549, 559 (10th Cir. 2002) (upholding conviction under § 924(c) in part because witness testified that guns were displayed in the same room of the defendant’s house where crack cocaine was kept); *United States v. Lott*, 310 F.3d 1231, 1247 (10th Cir. 2002) (citing Sixth Circuit case which held that where a firearm is present in the same premises as drugs or drug transactions, key is whether the weapon is “strategically located so that it is quickly and easily available for use” (citation omitted)); *United States v. Avery*, 295 F.3d 1158, 1180 (10th Cir. 2002) (upholding conviction under § 924(c) where weapons were found in home from which defendant sold drugs; most weapons were found in defendant’s bedroom, where agents also found drugs; all weapons were loaded); *United States v. Basham*, 268 F.3d 1199, 1208 (10th Cir. 2001) (holding that a firearm is possessed in furtherance of a drug trafficking crime if

it is kept “available for use if needed during a drug transaction”).³

This series of events may make *Bailey* relevant, although the court questions whether defendant and the government really intended that defendant agree to plead guilty to “using” the firearm. The court will consider this issue further in discussion of whether a miscarriage of justice would occur if the court enforces the waiver with respect to this claim.

C. *Miscarriage of Justice*

Enforcing a waiver results in a miscarriage of justice only if (1) the court relied on an impermissible factor such as race; (2) the defendant received ineffective assistance of counsel in conjunction with the negotiation of the waiver; (3) the sentence exceeds the statutory maximum; or (4) the waiver is otherwise unlawful in the sense that it suffers from error that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Hahn*, 359 F.3d at 1327.

The judgment entered in this case is inconsistent with the plea agreement. According to the judgment, defendant has been adjudicated guilty of the offense of “possession of a firearm in furtherance of a drug trafficking crime.” Petitioner was therefore convicted of a crime to which he did not agree to plead guilty. In his plea agreement, petitioner waived his right to challenge any matter in connection with his prosecution and sentence. To the extent that the waiver applies to the circumstances here, the court will not enforce the waiver as to this claim because to do so would result in a miscarriage of justice. The court finds that, with respect to this particular claim, the waiver suffers from error that seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See id.* Although petitioner was not convicted of a crime different than the crime he

³ Of course, if petitioner withdraws his plea, then he is free to argue at trial that the firearm was not “possessed in furtherance of a drug trafficking crime.”

was indicted for, he was not convicted of the crime to which he agreed to plead guilty.

The relief that petitioner is entitled to, however, is not the relief that he seeks. The appropriate relief is to set aside petitioner's plea. *Cf. United States v. Reasor*, 418 F.3d 466, 470-71 (5th Cir. 2005) (recognizing that, where factual basis of plea does not support guilty plea to crime charged in indictment, remedy is to permit withdrawal of plea); *United States v. Stewart*, 1995 WL 539473, at *3 (10th Cir. Aug. 31, 1995) (appropriate remedy for involuntary or unknowing plea is to vacate guilty plea). While petitioner has not expressly asked to withdraw his plea, his § 2255 motion is an appropriate vehicle in which to do so. *See* Fed. R. Crim. P. 11(e) ("After the court imposes a sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack."). Nonetheless, because petitioner has not expressly indicated a desire to withdraw his plea, the court is reluctant to vacate his conviction without petitioner obtaining advice from counsel about the consequences of the withdrawal of his plea. The court believes that the best approach is to appoint counsel for petitioner. The court will then conduct a status conference to determine whether further proceedings will include the withdrawal of petitioner's plea on the § 924(c) count and setting the case for trial, or permitting petitioner to replead.

II. Other Issues

Because the court is appointing counsel for petitioner, the court will take the other issues in petitioner's § 2255 motion under advisement and rule on them, if necessary, at a later time.

IT IS THEREFORE ORDERED that the Motion Pursuant to 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence By a Person in Federal Custody (Doc. 44) is taken under advisement. The court will appoint counsel and set a status conference by separate order.

Dated this 29th day of March 2006, at Kansas City, Kansas.

s/ Carlos Murguia
CARLOS MURGUIA
United States District Judge